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# The Antitrust Liability of Comsat in Its Role as Representative to Intelsat

## **Cover Page Footnote**

International Law; Commercial Law; Law

# The Antitrust Liability of Comsat in its Role as Representative to Intelsat

## I. Introduction

In 1962, the United States passed the Communications Satellite Act (CSA), creating Comsat, a corporation that represents the United States in the international arena.<sup>1</sup> A global satellite system was developed through the progress of the Intelsat system. In 1965, when Intelsat launched its first satellite, Early Bird, there were eleven member nations. By 1982, Intelsat controlled two-thirds of the world's international telecommunications and most international television.<sup>2</sup> Today, Intelsat consists of 121 member nations,<sup>3</sup> operates 15 satellites and provides satellite services to 180 countries.<sup>4</sup>

Under international agreements, Intelsat has enjoyed a monopoly in international satellite communications.<sup>5</sup> Participating nations designate representatives to serve in Intelsat. Satellite and communication companies, supplying telephone, data and television services, transmit and receive material from Intelsat satellites and charge their customers for these services. In the United States, access to Intelsat is controlled by Comsat.

The potential introduction of private competitive services ignited a fear in Intelsat signatories that private competitors would deprive member governments of Intelsat fees and undermine the entire

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<sup>1</sup> The Communications Satellite Act, or the CSA, is found in 47 U.S.C. §§ 701-748 (1988). Comsat provides services for all communications coming through the Intelsat system which originate or terminate in the United States. The Congressional debates that preceded the passage of the CSA were controversial but not within the scope of this Note. For a discussion of this controversy, see WALTER A. McDOUGALL, *THE HEAVENS AND THE EARTH* 354, 356 (1986). For a discussion of the legal background of the CSA see Jefferson C. Glassie, *Analysis of the Legal Authority for Establishment of Private International Communications Satellite Systems*, 18 GEO. WASH. J. INT'L L. & ECON. 355, 361-68 (1984); Victor G. Rosenblum, *Regulation in Orbit: Administrative Aspects of the Communications Satellite Act of 1962*, 58 NW. U.L. REV. 216, 216-19 (1963). See generally Harvey J. Levin, *Organization and Control of Communications Satellites*, 113 U. PA. L. REV. 315 (1965) (discussing the original version of the CSA).

<sup>2</sup> 47 Fed. Reg. 40226-02 (1982).

<sup>3</sup> The Selection of Irving Goldstein to be the U.S. Candidate for Director General of the International Telecommunications Satellite Organization, 137 CONG. REC. S15092-02, October 23, 1991. This includes the Confederation of Soviet States which joined Intelsat in July of 1991.

<sup>4</sup> *Id.*

<sup>5</sup> Until the development of the Pan American Satellite, the satellite at issue in this case, Intelsat consisted of only government-controlled satellite systems.

Intelsat system. Despite this fear, Article XIV of the Intelsat Agreement lists procedures that allow member nations to establish separate, non-Intelsat communications satellite systems. Comsat handles the consultations for U.S. companies wishing to establish a competitive satellite system.

The Reagan Administration endorsed the idea of limited competition with Intelsat. Yet, even with the Reagan endorsement, the plaintiff in *Alpha Lyracom Space Communications v. Communications Satellite Corp.*,<sup>6</sup> suffered a delay of over three years before receiving final launch approval from the FCC and permission from Intelsat for a competitive satellite system.<sup>7</sup>

In *Alpha Lyracom*, the United States Court of Appeals for the Second Circuit considered the issue of whether antitrust liability should extend to Comsat in its role as representative of the United States to Intelsat.<sup>8</sup> The Second Circuit held that Comsat is immune from antitrust liability when it acts as the U.S. representative to Intelsat.<sup>9</sup> This Note examines the court's reasoning in *Alpha Lyracom* and its implications for future communications and antitrust policy. It sketches the history of Comsat and Intelsat and highlights potential antitrust problems for both Comsat and Intelsat. The Note concludes that the Second Circuit's decision is consistent with both the CSA and Intelsat Agreements as well as the Sherman Antitrust Act. The Note further concludes that as a practical matter, the *Alpha Lyracom* decision will hinder the entry of U.S. corporations into the international satellite market, but will not prohibit this entry outright.

## II. Statement of the Case

Reynold Anselmo, doing business as Alpha Lyracom, owned and operated "the first international commercial communications satellite outside" Intelsat.<sup>10</sup> Alpha Lyracom operated its satellite communications through a space communications satellite called PanAmSat, or PAS I, launched in 1988.<sup>11</sup> Alpha Lyracom alleged that rather than conducting Article XIV(d) Intelsat consultations on PAS I's behalf, Comsat engaged in anticompetitive conduct to thwart PAS I's

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<sup>6</sup> 946 F.2d 168 (2d Cir. 1991).

<sup>7</sup> See *infra* notes 84-104 and accompanying text for a discussion of Presidential Determination No. 85-2 and the Foreign Labor Relations Act.

<sup>8</sup> *Alpha Lyracom I*, 946 F.2d at 169.

<sup>9</sup> *Id.*

<sup>10</sup> Alpha Lyracom is a sole proprietorship which in turn does business as Pan American Satellite, or PAS. *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 1990 WL 135637, 1 (S.D.N.Y. Sept. 13, 1990), *cert. denied* 112 S. Ct. 1174 (1992). Mr. Anselmo founded Pan American Satellite in Stamford, Connecticut. In 1989, he bought and launched the first privately owned communications satellite over the Atlantic for a cost of \$85 million. Today, his satellite is booked solid, offering rates about one-half of those offered by Intelsat. Edmund L. Andrews, *New Competition in the Sky, and Just in Time for the War*, N.Y. TIMES, Feb. 10, 1991, at § 3, 12.

<sup>11</sup> *Alpha Lyracom II*, 1990 WL 135637, at 1.

successful entry into both the domestic and the international satellite markets.<sup>12</sup>

In September of 1985, the FCC preliminarily approved Alpha Lyracom's application to construct and operate PAS I.<sup>13</sup> At that time, Comsat, in its capacity as Intelsat signatory, entered into Article XIV(d) consultations for PAS I.<sup>14</sup> In September 1987, following a favorable resolution by the Assembly of Parties,<sup>15</sup> Alpha Lyracom received final FCC approval to launch PAS I for communication transmissions between the United States and Peru.<sup>16</sup> Alpha Lyracom launched the satellite in June of 1988.<sup>17</sup>

In 1988, the Board of Governors of Intelsat approved the use of PAS I for domestic communications in the United Kingdom and Chile.<sup>18</sup> By 1989, Comsat had entered into Article XIV(d) consultations with the Assembly of Parties for the approval of Alpha Lyracom's services for international communications.<sup>19</sup> These consultations were completed by the end of 1989 and permission was granted to Alpha Lyracom to use PAS I in the approved markets.<sup>20</sup>

#### A. The District Court Decision

Alpha Lyracom contended that Comsat conspired with Intelsat and other representatives to delay PAS I's entry into the international satellite market.<sup>21</sup> Alpha Lyracom charged Comsat, acting together with Intelsat, with passing an anticompetitive resolution. This resolution required Intelsat to boycott competing systems, in effect delaying Article XIV(c) and Article XIV(d) consultations on PAS I's behalf.<sup>22</sup> Comsat also allegedly purchased excess satellite capacity and priced satellite telecommunications services without regard to costs. This action reduced the number of satellite spaces open to competing systems (such as PAS I). Alpha Lyracom's complaint also alleged that Comsat had entered into an agreement with various European signatories to provide "end-to-end" service, to set prices without regard to cost, and to form separate joint ventures

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<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* PAS I is a subregional Western Hemisphere satellite system. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> The Assembly of Parties consists of the member-nations to Intelsat. See *infra* note 94 and accompanying text.

<sup>16</sup> *Alpha Lyracom II*, 1990 WL 135637, at 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The United Kingdom and Chile requested the services of Alpha Lyracom for domestic communications. The Board of Governors approved the requests following Article XIV(d) consultations. *Id.*

<sup>19</sup> *Id.* Alpha Lyracom received approval to provide international services included the United Kingdom, Germany, Ireland, and several Central and South American countries. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.*

with several South American signatories.<sup>23</sup> Alpha Lyracom contended that Comsat, while responsible for conducting Article XIV(d) consultations on PAS I's behalf, actually prevented PAS I's entry into the world's satellite markets<sup>24</sup> Comsat allegedly filed a sham opposition to Anselmo's application to obtain a federal income tax deferral for the development, purchase, and launch of a telecommunications satellite, refused to do business with PAS I, and told potential customers that PAS I would be unable to obtain timely adequate satellite capacity or to complete Intelsat consultations.<sup>25</sup> Alpha Lyracom contended that this anticompetitive conduct violated sections 1 and 2 of the Sherman Antitrust Act.<sup>26</sup>

Comsat claimed that it was immune from suit by reason of the International Organizations Immunities Act<sup>27</sup> (IOIA) and the Headquarters Agreement of the Definitive Agreement of Intelsat.<sup>28</sup> Alpha Lyracom, however, believed that section 701(c) of the CSA reflected the clear intention of Congress to submit Comsat to antitrust liability<sup>29</sup> and sought both damages and injunctive relief for antitrust violations. Comsat moved to dismiss the action for failure to state a claim, lack of subject matter jurisdiction, and failure to join a necessary and indispensable party.<sup>30</sup> The district court granted Comsat's motion and dismissed the complaint.<sup>31</sup>

Alpha Lyracom's argument that Congress, on behalf of Comsat, waived Comsat's immunity from antitrust laws in section 701(c) of the CSA was not accepted.<sup>32</sup> The court held that Comsat had immunity from antitrust suits under paragraph sixteen of the Headquarters Agreement<sup>33</sup> and never reached the antitrust complaints. The court accepted the defendant's argument that section 701(c) concerns the ownership of large blocks of Comsat stock by communications common carriers such as AT&T and does not relate to Comsat's actions as representative to Intelsat.<sup>34</sup> Furthermore, Intelsat was considered a "necessary" party under Rule 19(a) because the

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<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* Most of the allegations concerned the restraint of trade and monopolization in violation of the Sherman Antitrust Act. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* See *infra* notes 105-17 and accompanying text.

<sup>27</sup> 22 U.S.C. § 288 (1988 and Supp. I 1989) [hereinafter IOIA]. See *infra* note 67 and accompanying text.

<sup>28</sup> *Alpha Lyracom II*, 1990 WL 135637, at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1. The indispensable party was Intelsat. The motion was filed under Federal Rule of Civil Procedure 12(b)(1), (6), and (7). *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 7. Section 701(c) of the CSA provides that Comsat "shall be consistent with the antitrust laws." 47 U.S.C. §§ 701-748. Comsat was granted immunity under the Headquarters Agreement of Intelsat.

<sup>33</sup> *Alpha Lyracom II*, 1990 WL 135637, at 8.

<sup>34</sup> *Id.* at 7. See *infra* notes 42-52 and accompanying text for the legislative history of § 701(c).

"lion's share" of Alpha Lyracom's allegations concerned action between Comsat and Intelsat's member nations.<sup>35</sup> Alpha Lyracom appealed to the Second Circuit.<sup>36</sup>

### B. *The Second Circuit Decision*

The Second Circuit upheld the district court's decision that Comsat was entitled to statutory immunity from antitrust liability for actions taken in its capacity as U.S. representative to Intelsat.<sup>37</sup> The court further held that the "antitrust consistency clause" of the CSA applied only to Comsat's activities as a common carrier and not as an Intelsat representative.<sup>38</sup> By examining the Sherman Antitrust Act and the CSA, the court concluded that Congress did not intend for Comsat to face antitrust liability in its capacity as a representative to Intelsat.<sup>39</sup>

The court held that the district court's dismissal of the claims against Comsat on the ground of immunity from antitrust liability was proper.<sup>40</sup> The Second Circuit, however, remanded the case to the district court because Alpha Lyracom was entitled to an opportunity to amend its complaint to replead allegations that might not encounter an immunity defense.<sup>41</sup>

## III. Background

### A. *Intelsat and Comsat*

In 1961, the United Nations passed a resolution calling for international cooperation in developing a global communications system in light of Soviet and American experimentation into space satellites and the use of satellite technology in global communications.<sup>42</sup> The resolution expressed the desire of U.N. member-nations that "communication by means of satellite should be available to the nations of the world . . . on a global and non-discriminatory basis."<sup>43</sup> This objective was to prevent technologically superior nations from launching satellites into the limited number of available orbits, thereby creating a monopoly on international satellite communications.

By enacting the CSA, Congress implemented the national policy goal of establishing "in conjunction and in cooperation with other

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<sup>35</sup> *Id.* at 9. Moreover, meaningful injunctive relief could not be granted without the presence of Intelsat in the suit. *Id.*

<sup>36</sup> *Alpha Lyracom I*, 946 F.2d at 168.

<sup>37</sup> *Id.* at 176.

<sup>38</sup> *Id.* at 174-75.

<sup>39</sup> *Id.* at 174.

<sup>40</sup> *Id.* at 173-75.

<sup>41</sup> *Id.* at 176.

<sup>42</sup> U.N. GAOR, 16th Sess., 1085 plen. mtg., Supp. No. 17, at 6, U.N. Doc. A/5100 (1962).

<sup>43</sup> *Alpha Lyracom II*, 1990 WL 135637, at 7.

countries, as expeditiously as practicable a commercial communications satellite system."<sup>44</sup> Rather than relying solely on governmental efforts, Congress sought to "provide for the widest possible participation by private enterprise."<sup>45</sup> Congress provided for private participation by creating Comsat, a publicly held corporation.<sup>46</sup> Comsat was to act "subject to appropriate governmental regulation . . . [as the] United States participa[nt] in the global system."<sup>47</sup> Under the CSA, Comsat assumed responsibility for planning, constructing, and operating the satellite system, either by itself or with foreign governments.<sup>48</sup>

Comsat is subject to Presidential supervision "to assure [that Comsat's relations with foreign governments and international organizations] shall be consistent with the national interest and foreign policy of the United States."<sup>49</sup> The CSA imposes a duty on Comsat to comply with all the provisions of Chapter 47 of the United States Code.<sup>50</sup> The CSA also authorizes a district court to enjoin Comsat from taking any action or adopting any practices or policies inconsistent with "the policy and purposes declared in section 701" of the CSA.<sup>51</sup> Section 701(c) declares the general intent of Congress to

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<sup>44</sup> 47 U.S.C. § 701(a). The Communications Satellite Act of 1962 embodies Congress' policy goals on the establishment of an international satellite system, among them the communication needs of the United States and contributing to world peace and understanding. *Id.* Although Congress initially vested in Comsat the responsibility of establishing the communications satellite system, in 1964, Intelsat assumed ownership of the system. Agreement Establishing Interim Arrangements for a Global Communications Satellite System, Aug. 20 1964, 15 U.S.T. 1705, 54 U.N.T.S. 26. Comsat remains the sole U.S. member of Intelsat and manager of the system. See generally *ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 736-37, n.4 (D.C. Cir. 1984). Although not formally a treaty as Congressional approval preceded formation of the agreement, the Intelsat agreement is a Congressional-Executive agreement, which normally is considered to have the full force of a treaty. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1986) ("[The] prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."); *B. Altman & Co. v. United States*, 224 U.S. 583, 598-602 (1912) (stating that a Congressional-Executive agreement is a "treaty" under statute conferring appellate jurisdiction).

<sup>45</sup> 47 U.S.C. § 701(c).

<sup>46</sup> *Id.* § 731.

<sup>47</sup> *Id.* § 701(c).

<sup>48</sup> *Id.* § 735(a)(1), (3).

<sup>49</sup> *Id.* § 721(a)(4).

<sup>50</sup> *Id.* § 743(c).

<sup>51</sup> *Id.* § 743(a). Section 701 provides:

(a) Policy

The Congress declares that it is the policy of the United States to establish, in conjunction and in cooperation with other countries, as expeditiously as practicable a commercial communications satellite system, as part of an improved global communications network, which will be responsive to public needs and national objectives, which will serve the communication needs of the United States and other countries, and which will contribute to world peace and understanding.

(b) Availability of telecommunication services

The new and expanded telecommunication services are to be made available as promptly as possible and are to be extended to provide global coverage at the earliest practicable date. In effectuating



foster competition in the operation of satellite networks. Section 701(c) concludes with the "antitrust consistency clause" which provides as follows: "[T]he activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws."<sup>52</sup>

Today Intelsat has 121 member nations who collectively maintain and operate an international network of telecommunications satellites.<sup>53</sup> Intelsat provides international telecommunications services to more than 170 countries, territories and dependencies. Intelsat further provides domestic telecommunications services to over thirty countries.<sup>54</sup> In 1971, the member nations of Intelsat executed two agreements formalizing the ground rules for Intelsat's control

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this program, care and attention will be directed toward providing such services to economically less developed countries and areas as well as those more highly developed, toward efficient and economical use of the electromagnetic frequency spectrum, and toward the reflection of the benefits of this new technology in both quality of services and charges for such services.

(c) Private enterprise; access; competition

In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate governmental regulation. It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this chapter be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

(d) Domestic use; additional systems

It is not the intent of Congress by this chapter to preclude the use of the communications satellite system for domestic communication services where consistent with the provisions of this chapter nor to preclude the creation of additional communications satellite systems, if required to meet unique governmental needs or if otherwise required in the national interest.

*Id.* § 701.

<sup>52</sup> *Id.* § 701(c).

<sup>53</sup> The United States and ten other nations entered into an interim executive agreement that created the International Telecommunications Satellite Organization (Intelsat). Intelsat was established by an Executive Agreement signed by the United States and 10 other nations in order to promote global telecommunications. See Agreement Establishing Interim Arrangements for a Global Communications Satellite System, Aug. 20, 1964, 15 U.S.T. 1705, 54 U.N.T.S. 26.

<sup>54</sup> International agreements prescribe the functions and authority of Intelsat, as well as the relations between the member nations. International executive agreements, such as Intelsat, to which the United States is a party constitute the law of the nation. *Weinburger v. Rossi*, 456 U.S. 25, 31 (1982); *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981). These international executive agreements are subject to the same treatment as treaties of the United States and are subject to the same rules of construction. *United States v. Pink*, 315 U.S. 203, 223-24, 227-30 (1942); *United States v. Belmont*, 301 U.S. 324, 330-32 (1937).

and management of the international satellite operations and support: the Definitive Agreement and the Operating Agreement.<sup>55</sup> The Definitive Agreement was signed by the government of each member nation and the Operating Agreement was signed by the signatory/representative of each member nation.<sup>56</sup>

The Definitive Agreement established a three-tiered organizational structure: the Assembly of Parties, the Meeting of Signatories, and the Board of Governors.<sup>57</sup> The Assembly of Parties provides one seat for each member nation and convenes once every two years to consider aspects of Intelsat that affect nations as sovereigns.<sup>58</sup> Most member nations have designated a government agency as their representative to the Meeting of Signatories. Each representative has one vote at the annual meeting. As in normal corporate law, a majority of representatives must be present to constitute a quorum.<sup>59</sup> The Board of Governors is composed of twenty-nine persons representing 103 signatories and is responsible for the day-to-day operation of Intelsat.<sup>60</sup>

Although Intelsat was created to form a global telecommunications network, it maintains procedures for member nations to establish separate, non-Intelsat, international or domestic communications satellite systems.<sup>61</sup> In particular, an applicant for a separate satellite system providing international service must engage in "consultations" with the Assembly of Parties and the Board of

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<sup>55</sup> Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," *opened for signature* Aug. 20, 1971, 10 I.L.M. 909 [hereinafter Definitive Agreement]; Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," *opened for signature* Aug. 20, 1971, 10 I.L.M. 946 [hereinafter Operating Agreement].

<sup>56</sup> Comsat signed the Operating Agreement for the United States.

<sup>57</sup> Definitive Agreement, *supra* note 55, art. III(a), 10 I.L.M. at 911.

<sup>58</sup> The Preamble to the Definitive Agreement expresses the commitment of each party to "the aim of achieving a single global commercial telecommunications satellite system as part of an improved global telecommunications network . . . which will contribute to world peace and understanding." Definitive Agreement, *supra* note 55, Preamble, 10 I.L.M. at 909-10. The Definitive Agreement entrusts the carrying out of this goal to Intelsat. Definitive Agreement, *supra* note 55, art. II(a), 10 I.L.M. at 911.

<sup>59</sup> *Id.*

<sup>60</sup> The United States has designated the State Department as its representative to the Assembly of Parties and Comsat as its signatory and representative to the Meeting of Signatories.

<sup>61</sup> These procedures are called the "consultation" procedures and are found in article XIV Definitive Agreement. See *supra* notes 57-60 and accompanying text. Together the Definitive and Operating Agreements give the Assembly of Parties, the Meeting of Signatories, and the Board of Governors virtually plenary authority to set rates for the use of Intelsat satellites. Definitive Agreement, *supra* note 55, art. V(d), 10 I.L.M. at 913, art. VIII(b)(v)(c), 10 I.L.M. at 916, art. X(a)(viii), 10 I.L.M. at 921; Operating Agreement, *supra* note 55, art. 8(a), 10 I.L.M. at 952. The Agreements also allow approval of Intelsat's purchases of goods and services. Definitive Agreement, *supra* note 55, art. X(a)(ii), 10 I.L.M. at 921, art. XIII, 10 I.L.M. at 916-17; Operating Agreement, *supra* note 55, art. 16, 10 I.L.M. at 955. The Agreements also allow approval of proposals to establish international and domestic telecommunications satellite systems separate from Intelsat. Definitive Agreement, *supra* note 55, art. XIV, 10 I.L.M. at 927-28.

Governors to ensure the technological compatibility of its system with Intelsat.<sup>62</sup> The "consultations" also exist to guard against the possibility that the competing system might cause "economic harm" to Intelsat.<sup>63</sup>

"Consultation" procedures distinguish between satellite systems for domestic services and international public communications services. Proposals for domestic service systems are initiated by the nation in which service will be utilized.<sup>64</sup> These proposals are subject to review only for technical compatibility with the Intelsat system.<sup>65</sup> When a separate system is proposed by a nation for international communications services under Article XIV(d), the final assessment of both the technical compatibility and economic impact of the proposed system on Intelsat must be made by the Assembly of Parties.<sup>66</sup>

### *B. International Organizations Immunities Act*

The International Organizations Immunities Act<sup>67</sup>(IOIA) confers immunity from every form of judicial process upon international organizations specifically designated by the President.<sup>68</sup> The broad purpose of the IOIA is to vitalize the status of international organizations of which the United States is a member and to facilitate their activities.<sup>69</sup> Since its inception, Intelsat has been designated as an

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<sup>62</sup> Definitive Agreement, *supra* note 55, art. XIV(d), 10 I.L.M. at 928.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* art. XIV(c), 10 I.L.M. at 928.

<sup>65</sup> *Id.* These reviews are held by the Board of Governors and findings are made in the form of recommendations. *Id.*

<sup>66</sup> *Id.* art. XIV(d), 10 I.L.M. at 928. Those seeking to provide separate domestic satellite services need "consult" only with the Board of Governors to ensure technical compatibility. *Id.* art. XIV(c), 10 I.L.M. 928.

<sup>67</sup> 22 U.S.C. § 288 (1988 and Supp. I 1989).

<sup>68</sup> *Id.*

<sup>69</sup> *Balfour, Guthrie & Co. v. United States*, 90 F. Supp. 831 (D.C. Cal. 1950). The IOIA provides:

[T]he term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgement such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.

international organization, and as such is entitled to the immunities under the IOIA.<sup>70</sup> The IOIA also provides that foreign officers and employees of international organizations are immune from suit and legal process relating to acts performed in their official capacity.<sup>71</sup> In addition, the IOIA states that "the archives of international organizations shall be inviolable."<sup>72</sup>

### C. Headquarters Agreement

In 1976, pursuant to the directive of Article XV of the Definitive Agreement, the United States entered into the Headquarters Agreement.<sup>73</sup> The Headquarters Agreement includes an immunity provision central to Alpha Lyracom's claims.<sup>74</sup> Paragraph sixteen of the Headquarters Agreement provides that "[t]he officers and employees of Intelsat, representatives of the Parties and of the Signatories . . . shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions. . . ."<sup>75</sup>

After the creation of Intelsat, the U.S. government, particularly the Executive Branch, exercised considerable authority under the CSA to oversee and regulate Comsat's management and operation of the system and its relations with foreign governments.<sup>76</sup> Executive Order No. 12,046 dictates that "[w]ith respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies."<sup>77</sup> The instructional process through which the Secretary directs Comsat's participation in Intelsat is formalized in written procedures. In

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22 U.S.C. § 288.

<sup>70</sup> Executive Order No. 11,966, 3 C.F.R. 90 (1978) (App. H). This Executive Order was signed by President Ford in 1977 and is the latest designation of Intelsat as an international organization. *Id.*

<sup>71</sup> 22 U.S.C. § 288d(b).

<sup>72</sup> *Id.* § 288a(c).

<sup>73</sup> Article XV of the Definitive Agreement requires each member nation to grant appropriate privileges, exemptions and immunities to Intelsat, to the member nations (Parties) and their representatives, and to the signatories and representatives of Signatories, relating to their conduct in carrying out their functions and duties. Definitive Agreement, *supra* note 55, art. XV, 10 I.L.M. at 929.

<sup>74</sup> The immunities provision is in paragraph 16 of the Headquarters Agreement. *See infra* notes 75-80 and accompanying text.

<sup>75</sup> International Telecommunications Convention, *opened for signature* Jan. 1, 1975, 14 I.L.M. 706, 714 [hereinafter Headquarters Agreement]. The United States signed the Headquarters Agreement on April 7, 1976.

<sup>76</sup> This oversight included designating satellite management entities. 47 U.S.C. §§ 721, 732-33, 742.

<sup>77</sup> 43 Fed. Reg. 13,349, 13,354 (1978). Executive Order No. 12,046 was made pursuant to the directive issued in CSA § 721(a)(4) to oversee COMSAT's relations with foreign governments.

particular, the Secretary will "instruct[] [Comsat] in its role as the designated United States representative to [Intelsat]"<sup>78</sup> and "direct the foreign relations of the United States with respect to actions under the Communications Satellite Act of 1962."<sup>79</sup> The procedures recognize that as U.S. representative to Intelsat, "Comsat exercises . . . an important foreign policy function on behalf of the U.S."<sup>80</sup>

Both the Definitive and Operating Agreements include provisions that suggest the possible imposition of legal liability against Intelsat Signatories.<sup>81</sup> Article XV(c) of the Definitive Agreement provides:

Each party, other than the party in whose territory the headquarters of Intelsat is located [the United States] shall grant in accordance with the Protocol referred to in this paragraph, and the Party in whose territory the headquarters of Intelsat is located [the United States] shall grant in accordance with the Headquarters Agreement . . . the appropriate privileges, exemptions and immunities to Intelsat, to its officers, and to those categories of its employees specified in such Protocol and Headquarters Agreement, to Parties and representatives of Parties, to Signatories and representatives of Signatories and to persons participating in arbitration proceedings. In particular, each Party shall grant to these individuals immunity from legal process in respect of acts done or words written or spoken in the exercise of their functions and within the limits of their duties, to the extent and in the cases to be provided for in the Headquarters Agreement and Protocol referred to in this paragraph.<sup>82</sup>

The United States, in fulfillment of its obligations under Article XV(c), provided in paragraph sixteen of the Headquarters Agreement that the "officers and employees of Intelsat, the representatives of the Parties and of the Signatories . . . shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions, except insofar as such immunity may be waived by the head of the executive organ of Intelsat for its officers and employees, [and] by the Parties and Signatories for their representatives. . . ."<sup>83</sup> *Alpha Lyracom* addressed the question of whether "representatives of the Parties" in the Headquarters Agreement include the signatories themselves.

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<sup>78</sup> 43 Fed. Reg. at 13,354.

<sup>79</sup> *Id.* See also Procedures for U.S. Government Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Commission, 77 F.C.C.2d 564 (1980); 1984 Memorandum of Understanding Among the Departments of State and Commerce and the Federal Trade Commission.

<sup>80</sup> 43 Fed. Reg. at 13,354. Before each Intelsat meeting, Comsat must circulate the agenda of the meeting to State Department officials who are charged with the responsibility of issuing instructions to Comsat on how to approach the agenda.

<sup>81</sup> See *infra* notes 82-83 and accompanying text.

<sup>82</sup> Definitive Agreement, *supra* note 55, art. XV(c), 10 I.L.M. at 928.

<sup>83</sup> Headquarters Agreement, *supra* note 75, 14 I.L.M. at 714.

*D. Presidential Determination Number 85-2*

In 1983, although Intelsat had functioned as the preeminent global satellite system since 1964, several American companies applied to the FCC for permission to operate and establish non-Intelsat international satellite communications systems.<sup>84</sup> The CSA made only a passing reference to competing satellites outside the Intelsat system, authorizing the President to explore the possibility of "a separate communications satellite system" where "required to meet unique governmental needs" or where "otherwise required in the national interest."<sup>85</sup> In 1984, occasioned by the influx of applications, President Reagan, acting pursuant to sections 701(d) and 721(a) of the CSA and his responsibility to determine whether additional international systems were "required in the national interest", issued Presidential Determination No. 85-2. The President determined that it was in "the national interest" to allow the development of separate non-Intelsat satellite systems.<sup>86</sup> Nevertheless, in order to meet the United States obligations under the Definitive Agreement, the President instructed the United States to consult with Intelsat before final authorization of any separate system was provided.<sup>87</sup>

The President further directed the Secretaries of Commerce and State to style criteria for the FCC which would insure that the United States met its international obligations.<sup>88</sup> The Departments of Commerce and State prescribed two criteria that had to be satisfied prior to final FCC approval and authorization to commence a separate, non-Intelsat system.<sup>89</sup> First, each new system must be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks.<sup>90</sup> Second, one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party under Article XIV(d) of the Definitive Agreement to insure technical compatibility and to avoid economic harm to Intelsat.<sup>91</sup> The FCC,

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<sup>84</sup> See Application of Orion Satellite Corp., FCC File No. CSS-83-002-P(LA) (filed Mar. 11, 1983); Application of Pan American Satellite Corp., FCC File No. CSS-84-004-P(LA) (filed May 31, 1984).

<sup>85</sup> 47 U.S.C. § 721(a)(6).

<sup>86</sup> 49 Fed. Reg. 46,987 (1984). Presidential Determination No. 85-2 declared separate, non-Intelsat international satellite systems to be "in the national interest." *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Letter from George P. Schultz, Secretary of State, and Malcolm Baldrige, Secretary of Commerce, to Mark S. Fowler, Chairman of the Federal Communications Commission (Nov. 28, 1984).

<sup>90</sup> *Id.* See *infra* note 91 for the text of the letter.

<sup>91</sup> *Id.* The text of the letter states that "[the system] be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks" and "one or more foreign authorities are to authorize use of each system and enter into consultation

while approving the concept of separate systems, adopted the two criteria.<sup>92</sup>

Before the FCC can grant final authorization for a proposed separate, non-Intelsat system the applicant must first obtain the authorization of each affected foreign country for the use of the system within that country and enter into Article XIV(d) consultations.<sup>93</sup> Further, the U.S. government must undertake and complete the consultation procedures within Intelsat's Assembly of Parties<sup>94</sup> as required by Article XIV(d) of the Definitive Agreement.

#### *E. Foreign Relations Authorization Act*

In the Foreign Relations Authorization Act (FRAA or the Act), Congress ratified both the procedures set forth in the Definitive Agreement and the President's accommodations to the competing interests of Intelsat and United States companies interested in entering into the telecommunications industry.<sup>95</sup> The FRAA, expanding on section 721 (a)(6) of the CSA, declared it the policy of the United States to make available, in addition to satellite services utilizing Intelsat facilities, "any additional such facilities . . . found to be in the national interest."<sup>96</sup> The additional facilities also had to comply with the Executive Branch conditions established pursuant to the Presidential Determination.<sup>97</sup> Moreover, these additional satellite services had to fulfill two criteria - technical feasibility and avoidance of economic harm as set out in Article XIV(d) of the Definitive Agreement.<sup>98</sup> The FRAA also requires compliance with the requirements set forth in Presidential Determination No. 85-2.<sup>99</sup> Further, the Act stipulated that "one or more foreign authorities have authorized the use of such system consistent with such conditions" as a precondition of consultations with Intelsat.<sup>100</sup>

The FCC released a report regarding the applications for separate, non-Intelsat systems on July 25, 1985.<sup>101</sup> The FCC Report followed the separate systems policy as put forth by the President, articulated by the Secretaries of State and Commerce and ratified by

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procedures with the United States Party under Article XIV(d) of the Intelsat [Definitive] Agreement to ensure technical compatibility and to avoid significant economic harm." *Id.*

<sup>92</sup> Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985).

<sup>93</sup> *Id.*

<sup>94</sup> The Assembly of Parties consists of the member-nations to Intelsat.

<sup>95</sup> Foreign Relations Authorization Act, Fiscal Years 1986-87, Pub.L. No. 99-93, § 146, 99 Stat. 405, 425-26 (1985).

<sup>96</sup> *Id.* § 146(a)(2).

<sup>97</sup> *Id.* § 146(b)(1).

<sup>98</sup> *Id.* § 146(a)(3).

<sup>99</sup> *Id.* § 146(b)(1).

<sup>100</sup> *Id.* § 146(b)(2).

<sup>101</sup> *In re* Establishment of Satellite Systems Providing International Communications, 100 F.C.C. 2d 290 (July 1985).

Congress.<sup>102</sup> While generally approving alternative systems, the FCC conditioned the issuance of licenses on successful Article XIV(d) consultations. Although the FCC noted that separate satellite systems would benefit users of international communications services, it concluded that "it [is] necessary to impose the Executive Branch restrictions on the authorization of these systems in order to meet our international obligations under the Intelsat Agreement."<sup>103</sup> The FCC Report did not constitute final approval of any particular separate, non-Intelsat system. The FCC Report expressly stated that the FCC will not issue a final license for the operation of any separate, non-Intelsat system "until the United States has completed coordination of that system with Intelsat pursuant to Article XIV(d) of the Intelsat Agreement and we have been informed by the Department of State that the United States has fulfilled its obligation under Article XIV(d)."<sup>104</sup> Thus, the FCC recognized that the U.S. support for separate, non-Intelsat systems must proceed within the Intelsat framework.

#### F. *Sherman Antitrust Act*

The Sherman Antitrust Act prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several States."<sup>105</sup> The Sherman Act further prohibits monopolizing "any part of the trade or commerce among the several States."<sup>106</sup> When Congress passed the Sherman Act in 1890, it took a very narrow view of its power under the Commerce Clause.<sup>107</sup> Subsequent Supreme Court decisions have permitted the reach of the Sherman Act to expand along with the broadening notions of congressional power.<sup>108</sup> As long as the restraint in question "substantially and adversely affects interstate commerce,"<sup>109</sup> the interstate commerce nexus required for Sherman Act coverage is established.

The Sherman Act also applies to regulated industries, but in a convoluted way. Only Congress, expressly or by implication, may authorize price fixing, and has done so in particular industries or compelling circumstances. Implied antitrust immunities are disfa-

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Id.* at 32.

<sup>105</sup> 15 U.S.C. § 1 (West 1992). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

<sup>106</sup> *Id.* § 2.

<sup>107</sup> See H.R. REP. NO. 1707, 51st Cong., 1st Sess., 1 (1890); Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW.U.L.REV. 71, 84 (1974).

<sup>108</sup> See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 201-02 (1974); *United States v. Employing Plasterers' Ass'n*, 347 U.S. 186 (1954); *Hosp. Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 n.2 (1976).

<sup>109</sup> *Gulf Oil Corp.*, 419 U.S. at 195.



vored.<sup>110</sup> Further, exemptions from the antitrust laws are to be strictly construed.<sup>111</sup> The Supreme Court, following the above logic, has consistently embraced the view that "[r]egulated industries are not per se exempt from the Sherman Act."<sup>112</sup> The antitrust laws represent a "fundamental national economic policy."<sup>113</sup>

The Supreme Court has only authorized implied exemptions to the antitrust laws for businesses regulated by federal law when and only when an exemption was needed to make the regulatory act "work and even then only to the minimum extent necessary."<sup>114</sup> If Congress did intend to repeal the antitrust laws, that intent governs.<sup>115</sup> Even when an industry is substantially regulated, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry.<sup>116</sup> Intent to repeal antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.<sup>117</sup>

#### IV. Analysis

##### A. *The Communications Satellite Act and Intelsat*

The *Alpha Lyracom* court's decision is consistent with both the interpretation of the language in the Headquarters Agreement and the intent of Congress under section 701(c) of the CSA. To allow Intelsat to function in other legal realms, the United States and other member-nations accorded Intelsat and its constituent parts immunity from suit. Article XV(c) of the Definitive Agreement requires the host nation [the United States] to execute a Headquarters Agreement which would grant the appropriate immunities.

Paragraph sixteen of the Headquarters Agreement requires each party to grant immunities "to Intelsat . . . , to Parties and representatives of Parties, to Signatories and representatives of Signatories."<sup>118</sup> The plaintiff in *Alpha Lyracom* argued for a strict interpretation of this language.<sup>119</sup> While the phrasing of paragraph sixteen arguably dis-

<sup>110</sup> See, e.g., *National Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975).

<sup>111</sup> See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Lab. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11 (1976).

<sup>112</sup> *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456 (1945).

<sup>113</sup> *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978).

<sup>114</sup> *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

<sup>115</sup> See *United States v. National Ass'n. of Sec. Dealers*, 422 U.S. 694, 720 (1975).

<sup>116</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959).

<sup>117</sup> E.g., *National Ass'n of Sec. Dealers*, 422 U.S. at 730-34; *Gordon v. New York Stock Exchange*, 442 U.S. at 689-90.

<sup>118</sup> Definitive Agreement, *supra* note 55, art. XV(c), 10 I.L.M. at 929.

<sup>119</sup> The plaintiff argued that they sued a party and signatory itself, not its representa-

tinguishes between "representatives of Parties" and "Signatories," its primary significance lies in its explicit direction to immunize "Signatories." The Definitive Agreement directs extension of immunity "to the extent and in the cases to be provided for in the Headquarters Agreement," thereby leaving the scope of immunity to be decided in the Headquarters Agreement. However, that qualification does not suggest that the Headquarters Agreement should be understood to exclude signatories entirely from the category receiving whatever degree of immunity is to be conferred.

Nevertheless, this interpretation seems inconsistent with the liberal construction of antitrust laws and the disfavor of antitrust immunity.<sup>120</sup> Also, language in the preceding paragraphs applies to natural persons, creating an argument that paragraph sixteen applies only to individuals who act as representatives of either parties or signatories, but not the entities themselves. The court dismissed this logic for three reasons: (1) paragraph sixteen lacks any intention to shield certain parties from immunity, (2) plaintiff uses Comsat as "the United States representative," and (3) exposure of Comsat to liability is inconsistent with the responsibilities Congress entrusted to Comsat.<sup>121</sup>

One strong reason for reading the Headquarters Agreement to include signatories in its grant of immunity is the absence of any indication that the odd arrangement which would result from a contrary interpretation was intended. Since the parties themselves will enjoy sovereign immunity, excluding signatories in paragraph sixteen would extend immunity to the parties, to Intelsat, and to the individual representatives of the parties, but not to the signatories themselves, at least not to those signatories like Comsat who are not themselves member-nations. It places no strain on the phrase "representatives of the Parties" to place signatories within that category.<sup>122</sup> Comsat is "the designated United States representative to" Intelsat.<sup>123</sup> Furthermore, the court stated "[t]hough the ultimate issue is what the drafters of the Headquarters Agreement meant, not how others regard Comsat, it is not insignificant that *Alpha Lyracom*

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tive. *Alpha Lyracom Space Co. v. Communications Satellite Corp.*, 1990 WL 135637, at 6 (1990). The district court did not agree with the plaintiff for two reasons: first, the plaintiffs acknowledged that COMSAT was the representative of the United States Party to Intelsat, *id.* second the plaintiffs ignored the fact that paragraph 16 "implements the directive of Art. XV(c) of the Definitive Agreement to the United States to confer 'appropriate privileges and immunities to Intelsat . . . to Parties . . . [and] to Signatories [e.g. Comsat] and representatives of Signatories' " *Id.* (citing Definitive Agreement, *supra* note 55, art. XV(c), 10 I.L.M. at 929).

<sup>120</sup> See *National Gerimedical Hosp. v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

<sup>121</sup> *Alpha Lyracom Space Communications v. Communications Satellite Corp.*, 946 F.2d 168, 174 (2d Cir. 1991).

<sup>122</sup> *Id.*

<sup>123</sup> Exec. Order No. 12,046, 43 Fed. Reg. 13,349 (1978) (Pres. Jimmy Carter).

repeatedly characterized Comsat as "the United States representative."<sup>124</sup>

Exposure of Comsat to antitrust liability in its role as U.S. signatory to Intelsat is inconsistent with the responsibilities Congress entrusted to Comsat under the CSA. "Congress could not have intended to require Comsat to participate in Intelsat subject to Executive Branch directives and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role."<sup>125</sup> Comsat has to participate in consultations as the U.S. representative to Intelsat. These consultations determine to what extent competing, separate, non-Intelsat systems will be allowed to operate.<sup>126</sup> Congress, having created Comsat to wield monopoly power, did not intend the corporation to face antitrust liability in deciding, as a member of Intelsat, whether and to what extent to permit competition.

The decision in *Alpha Lyracom* is consistent with section 701(c) of the CSA. Section 701(c) does not grant Comsat antitrust immunity explicitly. The "antitrust immunity clause" provides as follows:

In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate governmental regulation. It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this chapter be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.<sup>127</sup>

The antitrust concern of Congress was that once Comsat was formed common carriers participating in the ownership of Comsat would use their ownership position for private, anti-competitive purposes.<sup>128</sup> Thus, the "antitrust consistency clause" of section 701(c) of the CSA applies only to Comsat's role as a common carrier and not to its role as U.S. representative to Intelsat.<sup>129</sup> The list in section

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<sup>124</sup> *Alpha Lyracom*, 946 F.2d at 174.

<sup>125</sup> *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 1990 WL 135637, at 5 (S.D.N.Y. Sept. 13, 1990). See also *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57 (1985) (private parties acting at the direction of state officials or agencies are entitled to the same state action antitrust immunity that applies to those officials or agencies). See also *Cine 42nd St. Theater Corp. v. Nederlander Organization Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986).

<sup>126</sup> Definitive Agreement, *supra* note 55, art. XIV(d), 10 I.L.M. at 928.

<sup>127</sup> 47 U.S.C. § 701(c).

<sup>128</sup> See S.REP. NO. 1584, 87th Cong., 2d Sess. 11 (1962) (reprinted in 1962 U.S.C.C.A.N. 2269).

<sup>129</sup> *Alpha Lyracom*, 946 F.2d 168, 174.

701(c) does not indicate that Comsat's role in Intelsat must conform to antitrust litigation.<sup>130</sup> Further, Congress was advised by the Justice Department that "the mere doing of what [Comsat is] permitted to do under this bill is not itself going to result in an offense against the Sherman Act."<sup>131</sup>

However, these interpretations of the Headquarters Agreement and the CSA do not avoid the potential problem of anticompetitive conduct by Comsat in its role as the sole provider of access to the global satellite system to U.S. communication carriers. If Alpha Lyracom amends its complaint to allege anticompetitive behavior against Comsat in its capacity as a common carrier, then Comsat can not escape liability.

In 1985, Congress passed the International Telecommunications Satellite Organization Act.<sup>132</sup> The Act states that it is the United States policy "to foster and support the global commercial satellite system owned and operated by Intelsat."<sup>133</sup> Further, the United States is to support any communications satellite services "which are found to be in the national interest."<sup>134</sup> The *Alpha Lyracom* decision is consistent with the first policy goal. The decision is also consistent with the "national interest" policy goal. While PAS I may provide services that are cheaper than Intelsat services, this fact alone does not make it in the "national interest" for Comsat to actively lobby Intelsat on PAS I's behalf.

#### B. *The Sherman Antitrust Act*

This decision is consistent with the Sherman Antitrust Act. The Sherman Antitrust Act prohibits "restraint of trade or commerce."<sup>135</sup> While Comsat's role in Intelsat is one that is fraught with anticompetitive overtones, in the case of *Alpha Lyracom* Comsat did not engage in any violation of the Sherman Antitrust Act. While heavily regulated industries are not per se exempt from the Sherman Antitrust Act,<sup>136</sup> Comsat is exempt from the Sherman Antitrust Act in its role as signatory to the Intelsat treaty.<sup>137</sup>

Comsat's antitrust immunity as a representative to Intelsat is not explicitly addressed by paragraph sixteen of the Headquarters Agreement. However, Congress entrusted certain responsibilities to

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<sup>130</sup> 47 U.S.C. § 701(c).

<sup>131</sup> Antitrust Problems of the Space Satellite Communication System: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 58 (1962) (testimony of Asst. Atty. Gen. Katzenbach).

<sup>132</sup> Pub. L. 99-93, Title I, § 146, Aug. 16, 1985, 99 Stat. 425 (1985).

<sup>133</sup> *Id.* § 146 (a)(1).

<sup>134</sup> *Id.* § 146 (a)(2).

<sup>135</sup> 15 U.S.C. § 1 (1973). See *supra* notes 105-17 and accompanying text.

<sup>136</sup> See *supra* note 112.

<sup>137</sup> See generally Headquarters Agreement, *supra* note 75. See *supra* notes 118-19 and accompanying text.

Comsat in section 701 of the CSA.<sup>138</sup> For Comsat to function and make the CSA work,<sup>139</sup> Comsat must be exempted from the antitrust laws, but only to the minimum extent necessary. Congress authorized Comsat as the representative of the United States to Intelsat, and in so doing granted Comsat the power to conduct "consultations" under Article XV(d) of the Definitive Agreement.<sup>140</sup> The intent to repeal antitrust laws in the case of Comsat's status as the representative of the United States to Intelsat is clear as Comsat is empowered by Congress to conduct Article XV(d) "consultations" with Intelsat.<sup>141</sup> Therefore, Comsat's actions in representing Alpha Lyracom in Article XV(d) "consultations" cannot be a violation of the Sherman Antitrust Act.

The Second Circuit held that Comsat may be liable for violations of the Sherman Antitrust Act in its capacity as a "common carrier."<sup>142</sup> While Comsat is statutorily declared a "common carrier,"<sup>143</sup> treating Comsat as a "common carrier" would not relieve Comsat of antitrust liability. Section 701(c) would apply to Comsat as a "common carrier."<sup>144</sup> Even though section 701(c) of the CSA requires that the activities of Comsat "be consistent with the Federal antitrust laws,"<sup>145</sup> federal antitrust laws, specifically the Sherman Antitrust Act, provide that Congress can repeal antitrust laws when it empowers Comsat with the authority to conduct the type of activity under antitrust challenge.<sup>146</sup> In this case, Comsat is authorized to conduct Article XV(d) "consultations" with Intelsat, but in its role as a "common carrier" Comsat has similar authority. The Second Circuit ruled in *Alpha Lyracom* that Comsat would be liable in its role as a "common carrier", but for the above reasons it is doubtful that this would be the correct result on remand.

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<sup>138</sup> See *supra* note 130 and accompanying text.

<sup>139</sup> See *supra* note 114 and accompanying text.

<sup>140</sup> 47 U.S.C. § 701(a)-(d).

<sup>141</sup> See *supra* note 117.

<sup>142</sup> *Alpha Lyracom Space Communications Co. v. Communications Satellite Corp.*, 946 F.2d 168, 175-76 (2d Cir. 1991).

<sup>143</sup> 47 U.S.C. § 741. Section 741 states:

The corporation shall be deemed to be a common carrier within the meaning of section 3(h) of the Communications Act of 1934, as amended [47 U.S.C. § 153(h) (1988)], and as such shall be fully subject to the provisions of title II [47 U.S.C. §§ 201-224 (1988)] and title III [47 U.S.C. §§ 301-399 (1988)] of that Act. The provision of satellite terminal station facilities by one communication common carrier to one or more other communications common carriers shall be deemed to be a common carrier activity fully subject to the Communications Act [47 U.S.C. §§ 151-158 (1988)]. Whenever the application of the provisions of this chapter shall be inconsistent with the application of the provisions of the Communications Act, the provisions of this chapter shall govern. *Id.*

<sup>144</sup> See *supra* notes 142-43 and accompanying text.

<sup>145</sup> 47 U.S.C. § 701(c).

<sup>146</sup> See *supra* note 117 and accompanying text.

## V. Conclusion

The *Alpha Lyracom* holding that Comsat's activities as representative to Intelsat are exempt from antitrust considerations is consistent with the goal of Intelsat and the fear that the creation of private transatlantic satellite systems would undermine the objective of a single global system which would promote world peace.<sup>147</sup> In addition, if traffic was diverted from Intelsat, revenues would decrease and costs would increase creating chaos in the Intelsat system. Although it is in the "national interest" to have competing satellite systems,<sup>148</sup> that does not mean that Comsat must rapidly and forcefully advocate competing systems in the "consultations" before Intelsat. Comsat's behavior in this case was consistent with both its duties as a representative to Intelsat and the Sherman Antitrust Act, and therefore, Comsat should be exempt from antitrust liability in its capacity as Intelsat representative.

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<sup>147</sup> 47 U.S.C. § 701(a).

<sup>148</sup> This issue was addressed in the proposed International Telecommunications Competition Act of 1985. See International Telecommunications Competition Act of 1985, 131 CONG. REC. E505-02 (1985).